STATE OF MICHIGAN

COURT OF APPEALS

CRAIG BROWN and LYNETTE MYERS-BROWN,

Plaintiffs-Appellants,

v

INDIANA BUILDING SYSTEMS LLC, doing business as HOLLY PARK MANUFACTURER and PLEASANT STREET HOMES, and ROYAL MORTGAGE INC and BORROWERS NETWORK LLC and LORRIE GLASSFORD,

Defendant-Appellees.

UNPUBLISHED
June 29, 2010

No. 289102
Midland Circuit Court
LC No. 06-001398-NO

Before: K. F. KELLY, P.J., and JANSEN and ZAHRA, JJ.

PER CURIAM.

Plaintiffs Craig Brown and Lynette Meyers-Brown appeal as of right an order granting defendant Indiana Building Systems, doing business as Holly Park Manufacturer and Pleasant Street Homes (Indiana Building) summary disposition. Plaintiffs also challenge an order issued by the circuit court granting defendants Royal Mortgage Inc (Royal Mortgage), Borrowers Network LLC (Borrowers Network) and Lorrie Glassford (Glassford) summary disposition. We affirm.

I. BASIC FACTS AND PROCEDURE

Indiana Building manufactured a home, under the Holly Park product line, and sold it to Paul Brown[1] and Eileen Weimer through an authorized dealer, Chuck's Reliable Mobile Homes and Service (Chuck's Reliable). Indiana Building transported the home from its Indiana factory to Oil City, Michigan, where it was installed. Royal Mortgage financed the sale and secured a mortgage on the subject property. Plaintiffs submitted an affidavit by Paul Brown averring that he moved into the house around October 2001. He averred that after living several months in the

[1] Paul Brown is not related to plaintiff Craig Brown.

home he began to notice problems. Specifically, he averred that "[t]he floor in the utility room started to dip and in the kitchen, the floor started to drop and the ceiling started to crack." He further averred that the home was under warranty and that he requested the problems be fixed. He specifically averred that he mentioned the problems with the house to Glassford, an employee of Royal mortgage, "but she did not seem to care." Paul Brown also averred that while living in the home he "was getting headaches and felt tired a lot, but . . . thought it was from the stress I was going through at the time." However, Paul Brown and Eileen Weimer soon defaulted on the mortgage and executed a deed of foreclosure on September 18, 2002.

There is no dispute that the home was not winterized the winter of 2002-2003, and the electricity was turned off on November 26, 2002. Defendant presented evidence that in March 2003, Jeff Begley, an employee of Chuck's Reliable, inspected the home on behalf of Royal Mortgage. He averred "there was no heat in the home and the plumbing in the house was frozen and that I suspected there was quite a bit of plumbing damage." He indicated that he reported this condition to Royal Mortgage and explained that the utilities would have to be turned on to assess the damage, but that Royal Mortgage did not further contact him on the matter.

On August 14, 2003, Craig Brown entered a land contract with Royal to purchase the home for $96,000. Glassford executed the land contract on behalf of Royal. In connection with the sale, Glassford executed a seller's disclosure statement that indicated she had "never lived" in the home and that it was "unknown, whether there was "settling, flooding, drainage, structural or grading problems."

In June 2004, Craig Brown reported damage from a water leak in the bathroom to his home insurer, Farm Bureau. Farm Bureau sent a licensed professional engineer, Chad Zielinski, to investigate the insurance claim. After a re-investigation, Zielinski reported:

> At the time of the re-inspection the washer was removed from its original location and the lines were disconnected. The access panel was still in position. The panel was removed for inspection of the supply and drain lines in the wall cavity. Mold, water stains, and black discolorations were on the inside of the drywall and wall framing. The washer was hooked back up and operated. During the draining of the washer, the water was running down the drain line and saturating the building materials. The vent cap on top of the drain for the washer was not installed. It was sitting up top of the drain line.
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> Mold, black discoloration, and water stains were observed on the subfloor and floor joists in the area around the washer and drier [sic]. The subfloor is poorly deteriorated and in some area starting to decay. At the time of the inspection, condensation was observed on the underside of the subfloor in this area. The subfloor is severely warped and sagging. The moisture content of the subfloor was recorded at 100%. A significant amount of moisture was observed on the subfloor in the vicinity of the drain line and supply lines feeding the washer and drier.
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> Zielinski indicated that,

> "[t]he second leak has occurred directly adjacent to the washer and dryer. The leak is due to an improperly installed vent on the drain line. The vent is disconnected and is sitting on top of the drain line. As the washer drains, water discharges from the drain line saturating the building materials. Based on the level of deterioration and amount of mold, indicates [sic] that the problem has been ongoing for several years. As the vapor barrier in the crawlspace has been removed, the subfloor is highly susceptible to water damages due to the excessive moisture in the crawlspace.
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> In a November 9, 2006 supplemental report, Zielinski stated:
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> Based on our recent telephone conversation and my original report, the water damage in the kitchen and laundry room was due to water leaking from the drain line in the wall cavity adjacent to the washing machine. The vent cap was not properly attached to the drain line. When I removed the access panel to the plumbing and drain lines, the vent cap was lying on its side, on top of the drain line. This condition allowed a small amount of water to discharge from the open drain line during operation of the washing machine. The mold and water damage in the wall cavity was consistent with long-term leakage, indicating that the vent cap had been loose for several years. The vent cap—was not handled, nor was the washing machine and access panel re-installed. The water damage in the kitchen and laundry room occurred on the north half of the marriage line and is unrelated to the water damage from the plumbing leak on the shower enclosure, which is located on the south half.
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> Farm Bureau denied the insurance claim in part stating:
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> "It is the position of Farm Bureau that any mold remediation and/or significant damage to the structure was the result of a faulty and defective construction of this home by the manufacturer. It is clear that there was a defect in the area of the utility room which permitted and allowed for continuous seepage and discharge of water from washer line.

Plaintiff presented testimony from Craig Brown that Farm Bureau advised him to remove wet insulation and the vapor barrier under the home, which he did. Craig Brown testified that he soon afterwards became sick and went to the hospital complaining of difficulty breathing, a swollen face, and watering eyes. He claims he was told at the hospital not to return to the home.

Craig Brown defaulted on the land contract, and after several proceedings, an order of "Judgment of Possession after Land Contract Forfeiture" was entered that provided Craig Brown until June 14, 2005 to pay $9,920.40. He did not pay and Royal Mortgage gained title to the subject property.

On November 27, 2006, plaintiffs, acting *pro se*, filed a complaint against Indiana Building. The complaint alleged Indiana Building "failed to due [sic] their duty as a Manufacturer Business, by not inspecting their homes before sending them out to the public," and Indiana Building "failed to install the water line vent in the wall." Plaintiffs sought damages for structural damage to the home and Craig sought damages for personal injury, citing

"permanent mold in lungs," "allergies," "breathing difficulty" and "rashes on legs." Lynette Meyers-Brown also claimed damages for loss of consortium.

On March 21, 2007, plaintiffs sought to amend their complaint to add Royal Mortgage, Borrowers Network and Glassford as defendants, alleging misrepresentation. Royal Mortgage, Borrowers Network and Glassford answered the motion, maintaining the plaintiffs had executed the sale of the home, "as is," and that a seller disclosure form was not required because the home had been obtained through a deed in lieu of forfeiture.

On June 11, 2007, plaintiffs, through an attorney, filed a more detailed amended complaint alleging Indiana Building failed to properly secure an air vent cap (vent cap) atop the dishwasher drain line, which was located behind a wall. Plaintiffs alleged that Royal Mortgage, Borrowers Network and Glassford knew or should have known of the faulty vent cap and disclosed it to Craig Brown. The complaint alleged two counts: product liability against Indiana Building and silent fraud against Royal Mortgage, Borrowers Network and Glassford.

Royal Mortgage, Borrowers Network and Glassford moved for summary disposition. They argued that they had no duty to make disclosures in connection with the sale of the home. Indiana Building also moved for summary disposition, and in its supporting brief, arguing that plaintiffs could not show that there was evidence of mold or plumbing leaks at the time the home left the factory. Indiana Building noted that, upon its installation, the home had been inspected several times and passed every plumbing test. Indiana Building argued that Royal Mortgage "altered" the home by failing to winterize it and that Royal Mortgage's actions posed an intervening cause.

On November 13, 2007, Royal Mortgage, Borrowers Network and Glassford filed a response to Indiana Building's motion for summary disposition. They argued that "[i]t is absolutely egregious that [Indiana Building] would make accusations against Royal that it would allow the 'home to lie through harsh winter weather without utilities and winterization, allowing the home's plumbing to freeze, and then to sell the home 'as is' to an owner who would allow the plumbing leak without repair until the home had developed mold' when all the reports concluded that the damage was caused by . . . a leak in the shower on the south half of the house due to a broken fitting." Citing Zielinski's report, Royal Mortgage, Borrowers Network and Glassford maintained that any water damage resulted from an improperly installed vent cap.

On November 16, 2007, plaintiffs responded to Royal Mortgage, Borrowers Network and Glassford's motion for summary disposition, maintaining that Glassford had actual knowledge that the floor in the utility room and kitchen were sagging and that the kitchen ceiling was cracking. Plaintiffs noted that because Glassford only disclosed that "seller never lived at property," she withheld knowledge of a defect constituting fraud. On November 21, 2007, plaintiffs responded to Indiana Building's motion for summary disposition, arguing that the vent cap was not installed at the factory. Plaintiffs attached an affidavit from a licensed plumber, Carl Jenkins, averring that "[I]f the cap were installed properly, you should be able to see the seal tape impressions on the cap, there are none." He further averred that winterizing would not affect the vent cap because the dishwasher drainpipe would not have contained water.

On November 29, 2007, Indiana Building responded that the plumbing had been tested, and further stated that the dryer improperly vented below the home trapping accumulated

moisture. Indiana Building further claimed that the vent cap would have released water regardless of installation, that no seal tape impressions were fond because petroleum jelly was used, that the vent cap would have fallen during transportation, and noted that Jenkins' affidavit was not sworn.

After a hearing, the circuit court held, in regard to plaintiffs' product liability claim, that "the mere fact that leaks were not found at the time of the issuance of the plumbing permit in 2001 does not, when viewed in the light most favorable to the Browns, preclude a finding that the plumbing system, and the vent cap in particular, was nonetheless defective by virtue of either having been improperly installed or not installed at all." The court did not address Indiana Building additional assertions. In regard to plaintiffs' silent fraud claim, the court held there was no basis for imposing personal liability on Glassford because she was an agent of Royal Mortgage acting within her authority, and that Borrowers Network could not be liable because it did not exist at the time of alleged fraud. The court further held that Royal Mortgage was not liable because it was not required to make disclosures under the Seller's Disclosure Act (SDA), MCL 565.951 *et seq*., and that the Browns could have discovered any defect through an inspection. The court denied Indiana Building's motion for summary disposition and granted summary disposition to Royal Mortgage, Borrowers Network and Glassford.

Following further discovery Indiana Building filed a second motion for summary disposition in August 2008.[2] Plaintiffs, now again *pro se*, filed a motion opposing summary disposition.

At the September 26, 2008 hearing, Royal Mortgage argued that plaintiffs could not establish that the vent cap was not installed when it left the factory. Royal Mortgage attached a second affidavit from Zielinski indicting, "I cannot state that the position of the air admittance valve, when I saw it, was like that when the home left the home manufacturer's facility." The circuit court indicated to plaintiffs that the picture of the vent cap on top of the pipe "is not going to demonstrate to a jury that it was defective when it left Indiana Building Systems." The court asked, "[w]hat evidence are you going to have should this matter proceed to trial that it was defective when it left the control of Indiana Building Sytems?" In response, plaintiffs indicated that "a statement from Michael Smith which [sic] was hired by Midland County. That is the one that actually replaced the vent cap." Plaintiffs then alleged "in [Smith's] statement, he says there was never a cap on it when it left Indiana Buildings Systems in shipment." However, plaintiffs admitted that Smith's statement was not in the lower court file, but claimed it was "[a]t my house in four boxes of paperwork." The court then allowed plaintiffs to retrieve the Smith's statement and return to court. Lynette Brown went home and returned to court unable to find Smith's statement. In an October 14, 2008 order, the court granted Indiana' Building's motion for summary disposition and dismissed the case with prejudice.

That same day, October 14, 2008, plaintiffs filed a motion for reconsideration. Plaintiffs attached an affidavit from Michael Smith, a licensed mold remediation specialist, in which he

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[2] This writer has not located this motion in the lower court record, only "defendants exhibits A – M in support of its second motion for summary disposition."

states that "[d]uring my investigation, it appeared the leak started from the washer and dryer area. It is my professional opinion upon examining the original plumbing; piping the cap for the washing machine vent line, sand pipe had never been installed and was missing causing damage to the structure." Indiana Building responded, noting that Michael Smith's "affidavit" was dated after the summary disposition hearing, and did not meet the formalities of an affidavit; i.e., no confirmation by oath and not properly notarized. Further, Indiana Building noted that Michael Smith had not seen the home before June 2008 and could not testify that the home left the manufacturer in defective condition in 2001. Also, Indiana Building pointed out that Smith was not an expert. In a supplemental motion to the response to plaintiffs' motion for reconsideration, Indiana Building attached an affidavit from Michael Smith averring that he "signed [the original] affidavit prior to reading it in its entirety," and that he "asked that changes be made to certain language contained in the document, which changes do not appear." Smith further averred that "I have no information as to how that drain pipe came to be in that condition which was missing a cap," and that "I am not qualified to determine whether a cap had been on that pipe at any time, nor did I perform any scientific tests or investigation to make that determination."

At the November 7, 2008 hearing, the circuit court highlighted the second affidavit executed by Michael Smith. Plaintiffs asserted that Smith had only signed the affidavit because Indiana Building had threatened him with contempt for failing to attend a deposition. The court rejected plaintiffs' claim and denied plaintiffs' motion for reconsideration. This appeal ensued.

II. ANALYSIS

A. STANDARD OF REVIEW

On appeal, a court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id*. A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries* (*On Rehearing*), 441 Mich 379, 398-399; 491 NW2d 208 (1992). Only "the substantively admissible evidence actually proffered" may be considered. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6). Review is limited to the evidence that had been presented to the court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; ___ NW2d ___ (2009). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

B. PRODUCT LIABILITY THEORY

We conclude that the circuit court did not err in granting Indiana Building summary disposition because plaintiffs failed to submit admissible evidence to establish that the vent cap was improperly installed at the time the home left Indiana Building's control.

MCL 600.2946 provides, in part, that,

> [i]n a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller is not liable unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller . . .

Thus, plaintiff must prove that (1) the product was not reasonably safe when it left the control of the manufacturer or seller, and (2) "a practical and technically feasible alternative" design "would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others." Here, the issue on appeal is limited to whether the product was not reasonably safe when it left the control of the manufacturer or seller.

First, we note that much of the evidence plaintiffs presented was not admissible. In particular, plaintiffs, acting *pro se*, proffered statements from Paul Brown, Michael Smith, Carl Jenkins (a plumber) and Jerry Stockton (a mobile home dealer who also sets up and repairs mobile homes), in so-called affidavits. However, "[f]or a document to constitute a 'valid affidavit,' it must be: '(1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.'" *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 236; 713 NW2d 269 (2005), quoting *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000).

Here, the document signed by Michael Smith includes a "notary signature," by Melinda L. Hervert, but there is no indication that Hervert is a notary public, i.e., none of the formalities that would indicate the county in which she was authorized and nothing indicating the date on which her commission expires. The document also does not indicate that a notary public "acknowledged" that the document was executed before him/her.[3] The documents signed by Jerry Stockton and Carl Jenkins contain no mention of a notary at all. And although the alleged "affidavit statement" of Paul Brown appears notarized, there is no indication that the statement

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[3] Further, Michael Smith's affidavit is not part of the lower court record. Generally, this Court's review is limited to the record of the trial court. *In re Rudell Est*, 286 Mich App 391, 404-405; 780 NW2d 884 (2009); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). "In ruling on a motion for summary disposition, a court considers the evidence then available to it." *Quinto*, 451 Mich 366 n 5, quoting *Apfelblat v Nat'l Bank Wyandotte-Taylor*, 158 Mich App 258, 263; 404 NW2d 725 (1987). Here, Smith's affidavit was not before the circuit court when it decided the motion for summary disposition. The court even extended plaintiffs an opportunity to retrieve Michael Smith's affidavit and present it to the court. Plaintiffs returned without the affidavit. Further, as Indiana Building notes, the affidavit submitted at the reconsideration hearing is dated after the summary disposition hearing, which proves the affidavit was not in existence at the time of the summary disposition hearing. Thus, this Court need not consider Michael Smith's affidavit as part of the lower court record.

was taken under oath or affirmation. The document merely provides that "I, Paul Brown, have given the statement above to the best of my ability." This statement is not an oath nor does it indicate that Paul Brown "solemnly and sincerely" affirmed the statement "under the pains and penalties of perjury." MCL 600.1434. Thus, the only valid affidavit relied on by plaintiffs appears to be Chad Zielinski's affidavit. *Detroit Leasing Co*, 269 Mich App at 236.

Further, several of plaintiffs' contentions are not supported by admissible evidence. In particular, plaintiffs contend that summary disposition was improperly granted because the vent cap was "more or less in a sealed package." Plaintiffs assert the that vent cap was "concealed between the house frame and the outer wall covering, above the access panel to the plumbing in the utility room." However, neither Zielinski's initial report or his supplemental report indicates that the vent cap was "above the access panel." Zielinski's initial report states that "[t]he vent cap on top of the drain line for the washer was not installed. It was sitting on top of the drain line." The supplemental report states that [w]hen I removed the access panel to the plumbing and drain lines, the vent cap was lying on its side, on top of the drain." There is also no mention in Zielinski's affidavits that the vent cap was inaccessible. On the other hand, Zielinski's later affidavit expressly indicates that "[a]nyone who removes the access panel can reach the drain line and unscrew the air admittance valve." Although plaintiffs maintain that the vent cap was hidden or located above the access panel, there is no evidence to support this assertion. Rather, the picture depicts the vent cap as behind the access panel. Plaintiffs have not established that the vent cap was inaccessible.[4]

Plaintiffs main contention is that there is circumstantial evidence that the vent cap was not installed in the factory; specifically, that "Zielinski concluded in 2004 that the cap had been loose for several years," because "the mold formation and water damage were consistent with a leak that had been ongoing for several years." Plaintiffs argue that "Zielinski's 2004 conclusion of long term leakage, considered in conjunction with Paul Brown's complaints in 2001 of a sagging floor in the area of the leak, certainly permits a reasonable inference that the cap was never properly installed by [Indiana Building] and that the pipe stand has been leaking ever since the washer was first used."

The only evidence that arguably supports plaintiffs' claim that the vent cap was improperly installed at the time the home left Indiana Building's control is Zielinski's reports. The initial report stated that, "[b]ased on the level of deterioration and amount of mold, indicates that the problem has been ongoing for several years." The supplemental report similarly indicated that, "[t]he mold and water damage in the wall cavity was consistent with long-term leakage, indicating that the vent cap had been loose for several years."

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[4] Plaintiffs did provide the above mentioned so-called affidavit from Jerry Stockton, which states that "[t]he drain pipe/air vent is about 3 to 5 feet up the wall, after the plumbing access panel is removed. For a person to reach their hand up into the wall to remove that cap, they must have rubber arms and also be very strong. It is not possible." However, as discussed above, Stockton's statement is not notarized and thus not an admissible affidavit.

We conclude that while Zielinski's reports may be consistent with plaintiffs' theory, they do not establish that the vent cap was improperly installed when it left Indiana Building's control. The lack of evidence establishing that the vent cap was improperly installed when it left Indiana Building is fatal to plaintiff's claim:

> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence." [*Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994) (citation omitted).]

Further,

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [*Id*. at 165 (citations omitted).]

Plaintiffs have merely presented a mere possibility that the vent cap was improperly installed when it left the factory. Reports in 2001 of "sagging floor in the area of the leak" do not establish that there was actual water damage at that time. A sagging floor can be indicative of many circumstances. Again, speculation and conjecture are insufficient to establish a question of fact. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 464; 708 NW2d 448 (2005); *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Further, Zielinski's assertion that the leak had been ongoing for several years based on mold growth is likewise only consistent with theory that the vent cap was not installed when the home left the factory. As the circuit court noted, "there are million things that could . . . have happened to it after it left their control." Moreover, there is no evidence that Zielinski is even qualified to determine "based on deterioration and amount of mold" that the leak had been ongoing for several years. Zielinski was not qualified as an expert in this area and there is no indication that a "licensed professional engineer" is qualified to make this determination. While plaintiffs' insurance company may have accepted Zielinski's assessment for purposes of an insurance claim, courts of law are not bound to accept that assessment. The court properly granted summary disposition in favor of Indiana Building.

C. SILENT FRAUD

The circuit court also properly granted Royal Mortgage, Borrowers Network and Glassford summary disposition.

> Silent fraud or fraudulent concealment has also long been recognized in Michigan. Fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood, and courts have not hesitated to sustain recoveries where the truth has been suppressed with the intent to defraud. But for the suppression of information to constitute silent fraud there must exist a legal or equitable duty of disclosure. Further, establishing silent fraud requires more than proving that the seller was aware of and failed to disclose a hidden defect. Instead, to prove a claim of silent fraud, a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive. [*Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008) (citations and quotations omitted).]

The circuit court dismissed the instant claim of silent fraud on the basis that Royal Mortgage, Borrowers Network and Glassford did not have a legal duty to disclose.

In regard to a legal duty to disclose, MCL 565.952 provides that:

> The seller disclosure requirements of sections 4 to 13 apply to the transfer of any interest in real estate consisting of not less than 1 or more than 4 residential dwelling units, whether by sale, exchange, installment land contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with proposed improvements by the purchaser or tenant, or a transfer of stock or an interest in a residential cooperative.

However, MCL 565.953, provides that:

> The seller disclosure requirements of sections 4 to 13 do not apply to any of the following:
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> * * *
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> (c) Transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a mortgage or deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a power of sale under a mortgage or deed of trust or a sale pursuant to a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

Here, there is no dispute that Royal Mortgage, a mortgagee, acquired the real property by a warranty "deed in lieu of foreclosure. The SDA expressly "does not apply to" . . . "transfers by a mortgagee" that "acquired the real property by a deed in lieu of foreclosure." Thus, the court correctly held that Royal Mortgage, Borrowers Network and Glassford did not have a legal duty of disclosure in connection with the sale of the home.

Despite defendants' compliance with the SDA, plaintiffs nonetheless maintain that it may maintain its silent fraud claim pursuant to MCL 565.961, which provides that, "[t]he specification of items for disclosure in this act does not limit or abridge any obligation for

disclosure created by any other provision of law regarding fraud, misrepresentation, or deceit in transfer transactions." Here, although the phrase, "provision of law" likely only refers to enacted laws, nonetheless address plaintiffs' assertion that MCL 565.961 does not limit or abridge plaintiffs' silent fraud common law cause of action. Since there is no legal duty to disclose under the SDA, the only other potential duty to disclose is equitable.

Here, plaintiffs purchased the home "as is," and thus cannot maintain an equitable claim. The circuit court properly granted summary disposition to Royal Mortgage, Borrowers Network and Glassford.

Affirmed. Defendants may tax costs.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Brian K. Zahra